82-1165

NO. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JAMES H. CORDER and HARRY W. WESTERN, on on Behalf of Themselves and all Others Similarly Situated,
Petitioners,

vs.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County; et al., etc.,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, PICKENS COUNTY BOARD OF EDUCATION

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QUESTIONS PRESENTED

Respondent, Pickens County Board of Education, does not agree with the Petitioners' framing of the questions presented in this matter as specifically pertains to the Board and would therefore propose the following:

2. Whether the apportionment plan of the District Court was a legislative rather than court-ordered plan, thus, requiring preclearance under Section 5 of the Voting Rights Act as that issue was addressed by this Court in McDaniel v. Sanchez, 452 U.S. 130 (1981)?

3. Whether the District Court and Court of Appeals erred under prior decisions of this Court, Mahan v. Howell, 410 U.S. 315 (1973); Chapman v. Meier, 420 U.S. 1 (1975); and Connor v. Finch, 431 U.S. 407 (1977), in finding

here that special and unusual circumstances existed upon which a court-ordered reapportionment plan could include one at-large seat in an otherwise single-member district election scheme?

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STATUTES INVOLVED

There is an additional statute involved in the issues presented by the Petition and which is not cited by the Petitioners. The statute is Section 16-8-1, Code of Alabama (1975), appended hereto at 46a.

STATEMENT OF THE CASE

Respondent, Pickens County Board of Education, would adopt the Statement of the Case set out by Petitioners in that it refers to all of the relevant orders of the lower courts. While the Statement does not refer to the specific findings of fact which this Respondent deems pertinent to the issues presented, those findings are contained within the orders appended to this Brief in Opposition.

SUMMARY OF THE REASONS FOR DENYING THE WRIT

At the time the District Court was first called upon to fashion a reapportionment plan for the Pickens County Board of Education, it was faced with imminent primary election deadlines on both qualification of candidates and the election itself. 26a. Additionally, the District Court found that there were other "unusual circumstances" present that justified a deviation from the preferred single-member district plan. 27a. The plan by the very language of the District Court's opinion was court-ordered and not legislatively concocted.

There are specific findings of fact set out by the District Court in its initial and remand opinions, 25a

and 30a, which leave no doubt as to the basis for its fashioning a modified single-member district plan. The Court of Appeals found favor with the reasoning of the District Court in each instance where an unusual or special circumstance had been found. 14a-24a.

A.

Neither the District Court Nor the Court of Appeals Erred in Finding that a Modified Single-Member District Election Plan Was Appropriate for the Pickens County Board of Education.

There is no conflict between the District and Court of Appeal's decisions and the prior decisions of this Court. This Court has enunciated the principle "that single-member districts are to be preferred in court-ordered ...reapportionment plans unless the

court can articulate a 'singular combination of unique factors' that justifies a different result." Connor v. Finch, 431 U.S. 407 (1977); Chapman v. Meier, 420 U.S. 1 (1975); Mahan v. Howell, 410 U.S. 315 (1973). This is not to say that use of multi-member districts are unconstitutional, for this Court, in Whitcomb v. Chavis, 403 U.S. 124 (1971), recognized that such multi- member districts are not per se violative of the Equal Protection Clause; instead, the enunciated principle simply means single-member districts are preferred over multi-member districts absent special circumstances. "Where important and significant (county) considerations rationally mandate departure from (single-member districts), it is the reapportioning

court's responsibility to articulate precisely why a plan of single-member districts... cannot be adopted. Chapman v. Meier, 420 U.S. 1, 27 (1975).

With this mandate specifically in mind, the Court of Appeals remanded for further findings, whereupon, the District Court opined it "found and finds again that there are special and unusual circumstances which justify the adoption of a modified single-member district plan." 41a. The reasons given were three-fold.

First, there was an extremely short period of time before the primary elections with the candidate qualification deadline being two days after the court's order and the primary election itself only six weeks later. The court

properly relied upon the testimony of the probate judge as to the difficulty of ballot preparation as matters then stood and that to have election districts for the Board separate from the Commissioners' districts "would result in even further complicating the already difficult process." 41a-42a.

There is no doubt that the first enunciated reason or circumstance relied upon by the District Court would, as the Court of Appeals so held, suffice to "justify imposition of an interim remedy, ..." and therefore it refused "to hold it as sufficiently weighty to justify a permanently established, court-fashioned at-large election plan." 17a. However, the second and third reasons of the District Court as subsequently approved by the Court

of Appeals do present justification for the plan adopted here.

The Court of Appeals focused squarely on the second reason given by the District Court in its original opinion. This reason being that the District Court "declines to order the reduction of the Board of Education to four members." 27a. The District Court was mindful that Alabama Law mandates that a county board of education be comprised of five members, Section 16-8-1, Code of Alabama (1975). 42a-43a, 46a. The District Court declined to "alter the composition of the Board created by the Legislature unless compelled to do so by overriding constitutional considerations." 42a.

The District Court further found that this Board of Education was

operating under a terminal desegregation order issued in the case of Lee v. Macon County, C.A. 604-E (M.D. Ala., June 12, 1970). Under such order the Board was and is required to operate the system under a four attendance zone concept which as the District Court found were and are "centered around the four cities of Pickens County." 45a. Further relating the school attendance zones to the Commissioners' districts, the District Court determined that to fashion a five single-member district scheme out of a four attendance zone - four correctly apportioned single-member district county would "create a situation where one of the five districts has neither no schools in it or parts of two or more such attendance zones." 45a.

Whether the circumstances of the case are indeed special enough to justify the at-large seat is inherently a question of fact. The District Court found it compelling enough that the Board needed five members to avoid the "distinct possibility of deadlock votes" but, that five single-member districts would create an imbalance in voter representation, since there are only four school attendance zones. 43a-45a.

The Court of Appeals commented on the District's findings on the second and third unique circumstances by holding:

> As the (district) court viewed the problem, it was faced with either eliminating a structurally necessary, as well as legislatively mandated, fifth Board member, thus providing for a completely

> single-member district scheme, or reapportioning the Board of Education election districts to allow for five districts, thus providing for a Board member representing a district devoid of a high school and not predominantly identified with a particular school attendance zone. 18a-19a.

The Court of Appeals thus agreed with the District Court that "reapportionment into five districts is impractical," 21a, that maintaining Pickens County's four zone school system is justified, and that therefore, the District Court's plan of four single-member districts, responsive to the four school zones, and one multi-member district, responsive to all county voters, is "quite proper." 20a.

Both of the lower courts have examined the facts and circumstances of this case and have repeatedly found the

same to warrant the at-large seat. Petitioner would now have this Court again review the facts to determine whether it too finds the evidence sufficient to justify the at-large scheme of the Pickens County Board of Education. Such it would seem is not the duty of this Court in reviewing a petition for writ of certiorari. It is inherently recognized that this Court does not grant certiorari to review judgments based solely on questions of fact, or to review the sufficiency of evidence. National Labor Relations Board v. Waterman S. S. Corp., 309 U.S. 206 (1940); United States v. Johnston, 268 U.S. 220 (1925); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938); Southern Power Co. v. North Carolina Public

Service Co., 263 U.S. 508 (1924). However, the request of the Petitioner here seemingly asks this Court to do just that.

B.

The District Court's Plan Does Not Violate Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

Petitioners' first thrust in its petition to this Court argues that "the District Court Erred in Ordering a Re-apportionment Plan for the School Board that included an At-Large Position." (emphasis added). See, Petition, p. 22. Indeed, Petitioner must assume the plan at bar is a "court-ordered" one in order to invoke the arguments that "single-member districts are to be preferred in court-ordered...reappor-

tionment plans." Then, in an "about-face", Petitioner impliedly argues that the plan is not "court-ordered" but simply a "policy preference of the local school board", and therefore subject to the preclearance requirements of the Voting Rights Act. See, Petition at p. 31. Petitioner then cites McDaniel v. Sanchez, 452 U.S. 130 (1981), in support of his implied contention that the plan at bar is a "legislative" plan rather than a "judicial" one. Respondent would now show the Court that McDaniel should be distinguished from the case at bar, and that the modified single-member district plan here, is in fact, a "judicial plan," as Petitioner first assumes.

This Court, in McDaniel, states that two things are perfectly clear:

> First, the Act requires preclearance of new legislative apportionment plans that are adopted without judicial direction or approval. Second, the Act's preclearance requirement does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation.

The language is unambiguous, and the distinction is between legislative plans and judicial plans. Only legislative plans, are subject to the preclearance requirements of the Voting Rights Act. Is the plan under consideration here as formulated by the District Court and approved by the Court of Appeals a "legislative" plan or a "judicial" one?

In McDaniel, the District Court ordered county officials to prepare and submit a reapportionment plan for judicial approval. The county officials

then employed an independent expert to draft the plan, and when the same was in its final form it was submitted and the Court approved the plan and authorized the conduction of elections under it. The Court of Appeals had vacated the lower court's order, holding that a "proposed reapportionment plan submitted by a local legislative body does not lose its status as a legislative rather than court-ordered plan merely because it is the product of litigation conducted in a federal forum," 615 F. 2d 1023, and that therefore, the plan needed preclearance under the Voting Rights Act.

In McDaniel, the county officials and their agents, not the Court, actually formulated and devised the proposed plan, whereas the Court merely

approved it. Hence, the "proposal reflect(ed) the policy choices of the elected representatives of the people...," making the same a legislative plan, and preclearance was required, McDaniel v. Sanchez, supra, at p. 139.

In the present case, however, the Pickens County officials and the school board neither formulated nor devised the plan adopted by the District Court. The record unequivocally shows that the legislative plan of the Board had been objected to by the Attorney General, thus, the District Court "declined to approve" such a plan. 40a. The plan here clearly is a judicial one, and as such, is not subject to the preclearance requirements of the Voting Rights Act.

This Court should deny the request for the Writ of Certiorari requested by Petitioners and in doing so allow the consistent judgments and opinions of the District Court and Court of Appeals to stand.

CONCLUSION

For the aforegoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[639 F.2d 1191]

JAMES H. CORDER, and Harry W. WESTERN on behalf of themselves and all other similarly situated,

Plaintiffs-Appellants;

v.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County et al.,

Defendants-Appellees.

No. 76-3601

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

March 16, 1981

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, HILL and FAY, Circuit Judges.

TJOFLAT, Circuit Judge:

This case is before us following the

district's court's compliance with our last remand order. Corder v. Kirksey, 625 F.2d 520 (5th Cir. 1980) (Corder II). We affirm the findings and conclusions of the district court.

Because an understanding of the procedural posture of this case is important for an adequate prespective on our opinion, we shall discuss briefly the history of this litigation. For a more complete exposition of the history of this case, reference should be had to our opinion in Corder v. Kirksey, 585 F.2d 708 (5th Cir. 1978) (Corder I).

I

In 1973 the black residents of Pickens County, Alabama brought this action to challenge the constitutionality of the procedures used to elect the Pickens County Commission, the Pickens County

Democratic Executive Committee[1], and the Pickens County Board of Education. This action was based upon allegations that the relevant election districts were impermissibly malapportioned, see generally Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and that the at-large components of the electoral schemes unconstitutionally diluted the votes of blacks. See White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

Before this action was commenced, the procedure for election of Picken's five county commissioners was as follows: each of four districts nominated Commission

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1. None of the issues presented below concerning the Democratic Executive Committee remain for resolution on this appeal. See Corder v. Kirksey, 585 F.2d 708 at 710, n.3 (5th Cir. 1978) (Corder I).

candidates. These nominees then stood for election at large, all voters in the county voting for a candidate for each vacant Commission seat. This resulted in the election of four commissioners, each representing one district. The County Probate Judge filled the fifth Commission seat. Before this suit, the five members of the Board of Education were elected in the following manner: each of four members of the Board were required to reside in one of four districts, thus assuring each district's representation on the Board. Each of these candidates, however, was nominated on a county-wide basis. The fifth Board member was not required to reside in a particular district, and was also nominated at-large. All five members were elected on a county-wide or at-large basis.

On the plaintiffs' motion, the district court invalidated the district apportionment scheme employed in both the Commission and Board of Education elections as violative of the "one man, one vote" mandate of Reynolds, supra. The court enjoined the election of Commissioners until the Alabama Legislature corrected the constitutional defects in the scheme. Alabama promptly redrew the Commission district lines, but did not alter the at-large feature of the Commission election plan. The plan was submitted to the court and approved. On this appeal, the plaintiffs do not contest the validity of the new district lines. Rather, they argue that the at-large feature of the election of county commissioners is constitutionally offensive.

In regard to the Board of Education, the district court found the time

constraints imposed by an impending election to mandate a court-fashioned, rather than state-legislated, remedy. Accordingly, the court provided that the Board of Education would be elected according to the following plan: the Board would remain a five-member board. Four members were to be nominated and elected from four single-member districts corresponding to the constitutionally reapportioned Commission election districts. The fifth member, and Chairman, of the Board was to be elected at large. The plaintiffs readily accepted the district approtionment scheme and, also, the provision that four single-member districts would each elect a single representative. The plaintiffs contested, however, the at-large election of the fifth Board member.

When initially faced with this appeal, we remanded the case to the district

court for further findings in regard to both the court's approval of the at-large feature of the Commission election plan and the court's decision to fashion a Board of Education electoral scheme that included an at-large component. We instructed the district court to make findings on the former issue in light of our decision in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), and on the later [sic] issue in light of the requirement that "it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance [as opposed to a multimember district or at-large scheme] cannot be adopted." Chapman v. Meier,

420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975). See also Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977); Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320 (1973); Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971); Wallace v. House, 538 F.2d 1138, 1144 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977).

On remand, the district court made findings and concluded that neither the Commission nor the Board of Education at-large schemes were constitutionally offensive. Record, vol. 1 at 214. When the case was resubmitted to us, however, we found that an intervening Supreme Court decision, Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), had cast doubt on the vitality

of this circuit's approach, as articulated in Zimmer, supra, to the constitutional adequacy of legislatively enacted at-large schemes of election. Thus, we remanded the case again to the district court for further findings on the Commission election plan in light of the Supreme Court's mandate in Bolden. The district court has complied with our request, and has once again found the at-large plan constitutional. Record, vol. 1 at 225. The case is now in a posture that permits the resolution of plaintiffs' appeal.

II

A.

Plaintiffs first contend that the district court erred in approving the legislative decision to implement a scheme calling for the at-large election of county commissioners. The plaintiffs

argue that the at-large system of election dilutes the votes of blacks, and thus violates the fourteenth and fifteenth amendments of the Constitution.

It is clear that an at-large election is not a per se unconstitutional dilution of minority votes. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Whitcomb v. Chavis, 403 U.S. 124, 142, 91 S.Ct. 1858, 1868, 29 L.Ed.2d 363 (1971). Prior to Bolden, the law of this circuit required "a showing of racially motivated discrimination" for successful prosecution of a claim of constitutionally impermissible vote dilution under the fourteenth or fifteenth amendments. Nevett v. Sides, 571 F.2d 209, 219, 220 (5th Cir. 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980). See also Bolden, supra, 446 U.S. at 99, 100 S.Ct.

at 1517 (1980) (White, J., dissenting). That showing, however, could be made through recourse to inference; inference compelled by "such circumstantial and direct evidence of intent as may be available." Bolden v. Mobile, 571 F.2d 238, 246 (5th Cir. 1978) (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977)), reversed, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

A plurality of the Supreme Court has held that this circuit's previous standards for reaching an inferential determination of discriminatory intent are inadequate. Bolden, supra, 446 U.S. at 72, 100 S.Ct. at 1503 (per Stewart J.). Our failure, however, appears to have turned on the quantum of evidence required for such a finding, rather than

upon the substance of the approach itself:

> [T]he Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination, but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in Zimmer v. McKeithen .... That approach, however, is inconsistent with our decisions in Washington v. Davis ... and Arlington Heights.... Although the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose.

Id. (footnote omitted).

This statement, coupled with the plurality's apparent reaffirmation of White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), see id., 446 U.S. at 69, 100 S.Ct at 1051, indicates the plurality held that we must apply a more rigorous test when drawing the inference of racially discriminatory

purpose from facts, yet may, indeed must, continue to reach such a determination by recourse to facts inferentially referably to a discriminatory purpose, albeit facts perhaps almost conclusively referable to that offensive purpose. Moreover, after examining Justice White's dissent in Bolden, as well as Justice Blackmun's concurrence in the same case, we believe a clear majority of the Supreme Court would endorse the constitutional validity of recourse to a factually based inferential determination of the existence of racially discriminatory purpose. The problem, simply put, is: What is an adequate quantum of proof?

We admit to an initial perplexity in regard to this issue. Nevertheless, our review of the district court's findings allow us to put off to another day any attempt at a definitive interpretation of Bolden. In this case, the district

court has found on remand that there are simply no facts in the record probative of racially discriminatory intent on the part of those officially responsible for the Pickens County Board of Commissioners at-large election scheme. Record, vol. 1 at 227. Having reviewed the record, it is apparent that those findings are not clearly erroneous. Therefore, the district court's approval of the legislatively enacted at-large scheme for the election of Pickens County's Commissioners passes constitutional muster, and plaintiffs' first contention must fail.

B.

We may not so easily dispose of plaintiffs' second contention. Plaintiffs argue that it was constitutionally impermissible for the district court to have fashioned a remedy in regard to the

selection of the fifth member of the Board of Education which provided for at-large election. In Bolden, a clear majority of the Supreme Court has reaffirmed that "'[S]ingle-member districts [as opposed to at-large, or multi-member district schemes] are to be preferred in court-ordered legislative apportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320.' Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465." Bolden, 446 U.S. at 66 n.12, 100 S.Ct. at 1499 n.12 (1980). See also Bolden at 103-106, 100 S.Ct. at 1520-21 (1980) (Marshall, J., dissenting).

This circuit has followed that mandate: "When district courts are forced

to fashion reapportionment plans, the general rule is that single-member districts are to be preferred." Wallace v. House, 538 F.2d 1138, 1142 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977). In interpreting this standard, we have maintained that the unique or special circumstances allowing for a court-fashioned election scheme incorporating an at-large element were circumstances encompassing "the rare, the exceptional, not the usual and diurnal." Id. at 1144. It is against this standard that the district court's scheme must be judged.

The district court offers essentially two reasons for imposition of the at-large plan to elect the fifth Board of Education member. The first is that the short time it possessed to fashion a fair remedy in the face of an impending

election dictated the use of the at-large plan as a matter of constitutionally appropriate expediency. Record, vol. 1 at 219. While this might surely justify imposition of an interim remedy, see Wallace v. House, 538 F.2d 1138, 1145 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977), see also Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), we refuse to hold that it is sufficiently weighty to justify a permanently established, court-fashioned at-large election plan.

The second 'unique circumstance' is that Alabama has a longstanding policy favoring five-member boards of education. This policy makes good sense given the majority-vote decisionmaking procedure of these boards and the particular Pickens County plan of four school attendance zones and corresponding four

high schools, (both schemes established in a successful effort to comply with a desegregation order, see Record, vol. 1 at 220). Since these zones "substantially overlap" the Commission and Board of Education election districts, it is appropriate that while one Board of Education member should be elected from and represent each of these zones, the necessary fifth member, "responsive to all voters," should be elected on a county-wide basis. Record, vol. 1 at 219-220. As the court viewed the problem, it was faced with either eliminating a structurally necessary, as well as legislatively mandated, fifth Board member, thus providing for a completely single-member district scheme, or reapportioning the Board of Education election districts to allow for five districts, thus providing for a Board

member representing a district devoid of a high school and not predominately identified with a particular school attendance zone.

We agree with the district court that a five-member board of education makes good sense in Pickens County. We also agree that the facts as found by the district court reveal circumstances special enough to allow the at-large scheme of election.

Pickens County's four-attendance-zone system was the result of a terminal desegregation order. Thus, those zones are certainly not properly referable to purposeful discrimination. Moreover, although the finding of "substantial overlap" between the constitutionally apportioned election districts and the school attendance zones is a bit rough, it is in our judgment, not clearly

erroneous. See Record, vol. 1 at 146. These findings, coupled with an understanding that school board members traditionally represent a constituency composed of those who send their children to particular schools, makes the district court's plan for one member to be elected from and represent each of four districts, each roughly approximating a school attendance zone, quite proper.

The matter of the fifth member, while problematic, seems most appropriately resolved as the district court has done. Given Alabama's expressed policy, and the structural desirability of a five-member board, it is proper that a five-member board be maintained. The appropriateness of this goal, when coupled with the unique circumstances justifying maintenance of Pickens County's four-zone school system, and its overlapping

constitutionally apportioned four election districts, leads to an acceptance of an at-large scheme. Since reapportioment into five districts is impractical, and because a five-member board is structurally preferable, a county-wide election of the fifth member seem the most appropriate result.[2]

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2. We have applied what we feel to be the proper test for determining the constitutional adequacy of a court-fashioned at-large scheme. It is necessary, however, for us to offer this brief aside concerning a problem potentially connected with qualitative vote dilution claims such as that of these plaintiffs.

When one person's vote is given more weight than another's, the judicially cognizable constitutional violation is clear. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Simply put, the disproportionate distribution of the right to vote is mathematically demonstrable--it is objectively verifiable. A claim of qualitative vote dilution, on the other hand, is quite distinct. The claim there is that, despite each man having an equal vote, as well as having equal access to the voting process, the majoritarian form of election somehow fails to "serve the

FOOTNOTE CONTINUED ON FOLLOWING PAGE

FOOTNOTE CONTINUED---values of fair representation." Wallace v. House, 538 F.2d 1138, 1145 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977).

> "[T]he focus in such cases [qualitative vote dilution cases] has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities ..., a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests." Whitcomb v. Chavis, 403 U.S. 124, 158-159, 91 S.Ct. 1858, 1877, 29 L.Ed.2d 363. Bolden, supra 446 U.S. at 65, 100 S.Ct. at 1499 (1980).

In the proceedings below, the plaintiffs highlighted this aspect of their claim with particular clarity:

> The essence of all "one person-one vote" cases is to make such a system as representative as possible ... John Stuart Mill expressed it best when he wrote, in Representative Government:
>
> > In a really equal democracy any and every section would be represented, not disproportionately, but proportionately.

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FOOTNOTE CONTINUED ---

> A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority.

Plaintiffs' Memorandum In Support Of Motion For Relief, Record, vol. 1 at 177.

The Supreme Court has voiced similar sentiments in discussing the preference for single-member district democracy in court-fashioned elections. It is said that, in the absence of a "singular combination of unique factors," single-member districts are preferred because multimember districting and thus at-large schemes, see Bolden at 69-71, 100 S.Ct. at 1501-02 (1980), contribute to making "legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities...." Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977).

This stance troubles us a great deal. First, it seems at odds with the Bolden plurality's decided emphasis on verifiable discriminatory intent as the basis for a finding of constitutionally impermissible vote dilution. Second, and much more troubling,

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For the foregoing reasons, we must reject plaintiffs' contentions and affirm the judgment of the district court.

AFFIRMED.

FOOTNOTE CONTINUED---is the implicitly political character of this position. Perhaps it is the judiciary's role to work justice for those discrete, insular minorities at a perceived disadvantage in our system of representative democracy, see United States v. Carolene Products Co., 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234 (1938), but we question whether that role is most effectively served by immersing the court in the resolution of questions which center upon the legitimacy of conflicting theories concerning the nature of a truly representative form of government.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF

ALABAMA, WESTERN DIVISION

JAMES H. CORDER, et al.,
Plaintiffs;

v.

ROBERT H. KIRKSEY, et al.,
Defendants.

CIVIL ACTION NO. 73-M-1086

[Filed March 17, 1976]

ORDER

Pursuant to the Court's order of January 23, 1975, defendant Pickens County Board of Education has filed its response and report to the Court seeking approval of the plan of apportionment for the Board of Education as set forth in Act No. 72, Senate Bill No. 9, passed by the 1975 Fourth Special Session of the Alabama Legislature and approved by

the Governor of Alabama on November 14, 1975. This cause is before the Court also on plaintiff's motion for injunctive relief.

The Court has been informed that the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965 has objected to the plan of apportionment as set forth in Act No. 72. The Court is of the opinion that this plan cannot be enforced and declines to approve the plan. The Court is further of the opinion that under the circumstances, particularly the impending primary election to be held on May 4, 1976, for which candidates must qualify by March 19, 1976, the Court must fashion a plan of apportionment for the Pickens County Board of Education.

Although there is a preference for single-member districts when a court is called upon to fashion a plan of appor-

tionment, this Court finds that there are unusual circumstances which justify adoption of a modified single-member district plan. First, the short period of time remaining before the primary election is not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. Secondly, although the four Commissioners' Districts of Pickens County are constitutionally apportioned, the Court declines to order the reduction of the Board of Education to four members. Thirdly, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones, and while the zones are not congruent with the Commissioners' Districts, there is a substantial overlap.

Having considered the response and report of the Board of Education, the

motion, the pleadings and other papers on file in this case, the briefs and argument of counsel, the applicable law and the evidence presented in open court, the Court is of the opinion that one member of the Pickens County Board of Education should reside in and be nominated and elected from each of the Pickens County Commissioners' Districts and one member should be nominated and elected at-large without regard to the place of residence within Pickens County.

Accordingly, it is ORDERED, ADJUDGED and DECREED that henceforth one member of the Pickens County Board of Education shall reside in and be nominated and elected from each of the Pickens County Commissioners' Districts and one member shall be nominated and elected at-large without regard to be place of residence within Pickens County, according to the

following schedule:

Member at large	1980
District 1	1976
District 2	1978
District 3	1980
District 4	1976

It is ORDERED further that in all other respects the request for relief as to the Board of Education made by plaintiffs in their motion for injunctive relief is hereby denied.

Done this 17th day of March, 1976.

S/FRANK H. McFADDEN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

JAMES H. CORDER and HARRY W. WESTERN, on behalf of themselves and all others similar situated,

Plaintiffs,

v.

ROBERT H. KIRKSEY, Ind. and as Probate Judge of Pickens County, et al.,

Defendants.

C.A. 73-M-1086

[Filed February 16, 1979]

MEMORANDUM OPINION

By order dated November 16, 1978, the Court of Appeals remanded this matter for further findings. This memorandum opinion is issued in lieu of findings pursuant to Rule 52 Fed. R. Civ. P.

This case challenged the apportionment scheme of the Pickens County, Alabama County Commission, Board of Education and Democratic Executive Committee. The thrust of the complaint was directed toward the disparity in population of the election districts and a contention that election in multi-member districts diluted the voting strength of blacks.

The court, by order dated January 23, 1975, held unconstitutional the then existing legislative act, Act 141, 1967 Regular Session, setting up the election districts for the Pickens County Commission because it violated the doctrine of one-man, one-vote. The court also invalidated the election scheme for the Board of Education and that of the County Democratic Executive Committee. It directed the Democratic Executive Committee to reapportion itself and held the case in abeyance in order to give the

legislative process an opportunity to correct outstanding apportionment problems in Pickens County with respect to the County Commission and the Board of Education without further judicial intervention. The court was of the opinion that it should give the Legislature an opportunity to correct the imbalance with respect to the two legislatively created boards.

> [R]eapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

Reynolds v. Sims, 377 U.S. 533, 586, 84 S.Ct. 1362, 1394 (1964). See also Burns v. Richardson, 384 U.S. 73, 83, 86 S.Ct. 1286, 1292 (1966).

COUNTY COMMISSION

By order dated March 12, 1976,

the court approved the plan of apportionment of the Commissioner's districts of Pickens County as set forth in Act No. 594, H.B. 1566, passed by the 1975 Regular Session of the Alabama Legislature and approved by the Governor of Alabama on October 1, 1975. This plan provided for four Commissioner districts of substantially equal population. Candidates are nominated from each district but are elected in the general election on an at-large basis. The fifth member of the commission is the probate judge.

Plaintiffs' present objection to the Commissioners' plan is to the at-large general election, which they claim dilutes the voting strength of the blacks.

At-large election procedures are not per se unconstitutional. Whitcomb v. Chavis, 403 U.S. 124, 142, 91 S.Ct. 1858,

1868 (1971); Nevett v. Sides, 571 F.2d 208, 222 (5th Cir. 1978); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

In order to carry their burden of showing a dilution of voting strength, plaintiffs must show either a racially motivated plan, or that the apportionment scheme would operate to minimize or cancel out the voting strength of the black voters. Zimmer v. McKeithen, supra.

According to 1970 Census figures, Pickens County had a population of 20,326. There were 11,854 whites (58%) and 8,466 (42%) blacks. The over eighteen group was 65% white and 35% black. According to 1974 registration figures, there were 11,699 registered voters in the county, 30% black and 70% white. There is no evidence before the court with respect to a population breakdown; that is, there is no evidence about the

distribution of the black population from which an inference could be drawn with respect to the voting strength.

Applying the test of Zimmer v. McKeithen, supra, the court is of the opinion the plaintiffs have totally failed to carry the necessary burden of proof with respect to the county commission. The court is mindful of the admonition of the Court of Appeals on remand, but there is no evidence before the court on which to draw inferences that the election scheme dilutes the voting strength of blacks or that the scheme was designed to discriminate against blacks.

There are no black elected County Commissioners in Pickens County. However, as the court noted in Zimmer, a disparity between the number of minority residents and the number of minority representatives is insufficient in and of itself

to establish unconstitutionality of the statute.

The general law of Alabama provides for the at-large elections in county commission elections, but this has been modified in many instances by local acts. There is no evidence that this policy is in any way connected with racial discrimination; plaintiffs simply put no evidence on with respect to this issue.

There was no evidence of racial polarization in Pickens County. There was evidence of voter crossover, whites voting for blacks and blacks voting for whites. Plaintiff Corder testified that there were no problems in registering blacks to vote and that the Board of Registrars fully cooperated in registering blacks. There was further evidence that there was no trouble of a black getting on a ballot to run for

public office. In short, there was no proof of any denial of political access in that county to the blacks; nor was there any eivdence of discrimination in the distribution of services to blacks. There was evidence of money spent on a countywide water system provide service to all black communities, a new social service center, a new county hospital, in cooperative efforts with the Black Economic Development Council. There was evidence of black participation in all aspects of the political and community life of the county.

The only evidence plaintiffs submitted on this issue was to the effect that some rural black churches did not get paved parking lots promised for political support and there were not enough blacks in managerial positions in the county.

It does not appear to the court that the at-large general election feature contravened the Constitution and accordingly the court was loath to substitute its judgment for that of the Legislature, notwithstanding the Supreme Court's clearly stated preference for single-member districts when federal courts have to fashion a remedy. Had the court been fashioning a remedy, as in the case of the school board, I might well have opted for single-member districts as I did there; but, absent proof of impermissible discrimination in the scheme, the court did not deem it appropriate to substitute its judgment for that of the Legislature.

This court should not strike down laws merely because it believes them to be unwise. Ferguson v. Skrupa, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030 (1963).

"[C]ourts do not substitute their social and economic [and political] beliefs for the judgment of legislative bodies, who are elected to pass laws." Id. at 730, 83 S.Ct. at 1031. This Court should invalidate laws only when they are constitutionally impermissible.

In this connection, it should be noted that while the evidence is somewhat sketchy, it appears that generally speaking the elections are determined in the nominating primaries. According to the evidence, only one Republican had been elected to a county office in Pickens County. No candidate from the National Democratic Party of Alabama, the once predominantly black political party, has been elected. Nomination by the Democratic Party is generally tantamont to election. As plaintiffs stated in a memorandum submitted to the court on August 30, 1974 in

support of a motion for partial summary judgment: "Since Pickens County, like most rural counties in Alabama, has one predominant party, the results of the Democratic Primary are usually conclusive."

BOARD OF EDUCATION

The court declined to approve a reapportionment plan passed by the Alabama Legislature for the Board of Education because the Attorney General of the United States, pursuant to Section 5 of the Voting Rights Act of 1965, had objected to the plan of apportionment. The court accordingly fashioned a reapportionment plan based on the four Commissioner's districts. The court's order required the election of one member from each district, and the fifth was to be nominated and elected by the county at-large. The plaintiffs sought

sought five single-member districts. The Court of Appeals strongly suggests that the court should have used the Commissioner districts and caused the election of a four-man Board of Education.

Although there is a preference for single-member districts, when a district court is called upon to fashion a plan of apportionment, this court found and finds again that there are special and unusual circumstances which justified the adoption of a modified single-member district plan. First, the short period of time remaining before the Primary Election was not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. The deadline for qualifications was March 19, 1976. The election was to be held on May 4, 1976. The probate judge, who is responsible for the orderly

operation of the election process, testified that at least 10 to 12 different ballots would be required for the upcoming Democratic Primary as well as for the Republican Primary to be handled concurrently. To create five districts in addition to the four Commissioner districts would result in even further complicating the already difficult process.

Second, although there are four Commissioner districts which are constitutionally apportioned the court declined to order the reduction of the Board of Education to four members. Neither party suggested this alternative and the court was and is of the opinion that it should not alter the composition of the Board created by the Legislature unless compelled to do so by overriding constitutional considerations. Under Alabama

law, Title 52 §63, Code of Alabama (now §16-8-1, Code of 1975), a county board of education is to be composed of five members. While there is the suggestion of authority to make such alterations in a legislatively created body, this court is reluctant to do so absent compelling constitutional reasons. See Bolden v. City of Mobile, 571 F.2d 238, 246-247 (5th Cir. 1978), probable jurisdiction noted 47 U.S.L.W. 3221 (Oct. 3, 1978). Moreover, the exercise of such authority if it exists seems inapporpriate in this case. In the court's opinion, the fifth member would be an indispensable person in the Board's operation of the system. Most, if not all, decision-making bodies composed of more than one individual have an odd-number of members. Even-numbered decision-making bodies create a distinct possibility of deadlock votes.

The fifth position of the Pickens County Board of Education elected at-large is the chairman. The testimony from both sides is clear that Board members elected from a district tend to be more responsive and concerned, as they should be, with their respective school patrons. The chairman not only prevents deadlocks, but because elected at-large represents the entire county and has to be responsive to all the voters. The balancing effect of the fifth member thus is obvious to this court.

Third, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones, and, while the zones are not congruent with the Commissioner's districts, there is a substantial overlap. These four attendance zones are the result of a terminal

desegregation order issued in the case of Lee v. Macon County, C.A. 604-E (M.D. Ala., June 12, 1970). These zones are centered around the four cities of Pickens County (Aliceville, Carrollton, Gordo and Reform). The only four high schools and related feeder schools are located in these same cities and zones. The election scheme of Board members has followed the high school attendance zones since at least 1949. A fifth single-member district would create a situation where one of the five districts has either no schools in it or parts of two or more such attendance zones. The imbalance of such a scheme is inherent.

S/FRANK H. McFADDEN
Chief Judge

February 16, 1979

§16-8-1. Code of Alabama (1975)

Composition; election; qualifications.

The county board of education shall be composed of five members, who shall be elected by the qualified electors of the county. They shall be persons of good moral character, with at least a fair elementary education, of good standing in their respective communities and known for their honesty, business ability, public spirit and interest in the good of public education. No member of the county board of education shall be an employee of said board; provided, that in counties having populations of not less than 96,000 nor more than 106,000 according to the most recent federal decennial census, not more than one classroom teacher

employed by the board may serve as a board member and also as a teacher. Members shall not be required to hold teachers' certificates. (School Code 1927, §§87, 92; Code 1940, T. 52, §§ 63, 68; Acts 1949, No. 369, p. 542; Acts 1949, No. 667, p. 1031; Acts 1964, 1st Ex. Sess., No. 249, p. 346; Acts 1969, No. 331, p. 705.)